Supreme Court, U. S.
FILED
AUG 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-165

CHRISTIAN A. TINAWY,

Petitioner,

- v -

TRAVELERS AID SOCIETY
OF NEW YORK, INC.,
ELIZABETH P. ANDERSON,
GENERAL DIRECTOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1979

No. .....

CHRISTIAN A. TINAWY,

Petitioner,

-against-

TRAVELERS AID SOCIETY OF NEW YORK, INC., ELIZABETH P. ANDERSON, GENERAL DIRECTOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, Christian A. Tinawy, respectfully prays that a writ of certiorari issue to review the Order of the State of New York Court of Appeals entered in this proceeding on May 3, 1979, and the opinion dated December 20, 1977 of the Supreme

Court, New York County, Special Term, Part I, filed January 24, 1978.

OPINION BELOW

The Order of New York State Court of Appeals and the Memorandum of the lower Court basis of that Order appear in the Appendix and are not reported.

JURISDICTION

The Order of New York State Court of Appeals denying reargument was entered on May 3, 1979. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 USC §1254 (I).

QUESTIONS PRESENTED

Whether denial on procedural ground by a state law of an action in damage delayed by defendant's deliberate concealment of its supportive documents, is not incompatible with the equal protection of the laws of the Constitution's XIV Amendment; or, in terms and circumstances of this case:

Whether New York State Human Rights Law (Executive Law, §297.9), providing that anyone aggrieved by discrimination shall have (within a one-year statute of limitation), a choice of administrative or judicial remedies, should be construed as barring judicial relief for intentional damage by a former employee who was denied merits and seniority promotion, and, soon after he had to retire pursuant to the bylaws, uncovered in the possession of his former employer, statutory documents

justifying the promotion, ignored and reneged by the employer in a past administrative procedure.

STATUTORY PROVISIONS INVOLVED

A. The following sections of New York State Human Rights Law (Executive Law, Article 15): quoted from "Human Rights Law, as Amended through August 29, 1976", State Division of Human Rights, 2 World Trade Center, New York City 10047.

- section 292.4: "The term 'unlawful discriminatory practice' includes only those practices specified in sections two-hundred-ninety-six and two-hundred-ninety-six (a) of this article:

- section 296.3a(a): "It shall be unlawful discriminatory practice, because an individual is between the ages of eighteen and sixty-five, to... discriminate against such individual in promotion, compensation, or in terms, conditions or prividleges of employment."

- section 297.5: "Any complaint filed pursuant to this section must be filed within one year after

the alleged unlawful discriminatory practice;

- section 297.9: "Any person claiming to be aggrieved by unlawful discriminatory practice shall have a cause of action for damage... No person who has initiated any action in a court of competent jurisdiction, or who has any action pending before an administrative agency based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint for the same grievance under this section".

- section 300: "Construction. The disposition of this article shall be construed liberally for the accomplishment of the purposes thereof relating to discrimination because of race, creed, color or national origin..."

- section 301: "Separability. If any

clause, sentence, paragraph, section or part of this article or the application thereof to any person or circumstances, shall, for any reason, be adjudged invalid - or unconstitutional - such judgment shall not affect the remainder thereof to other persons or circumstances but shall be confined to the person or circumstances directly involved in the controversy" (section 3 of Chapter 662 of the Laws of 1975).

B. New York C.P.L.R. 3212: Motion for summary judgment..." (c) shall be denied if any party shall show facts sufficient to require a trial of any issue of facts."

C. Constitution of the United States, XIV Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 22, 1958 petitioner entered the employ of the Travelers Aid Society of New York, Inc., a non-profit society founded in 1905 for the service of travelers (°). His credentials consisted of the knowledge of five foreign languages, graduate studies (M.A.)

(°)supported by contributions from the general public, gifts and bequests - a one million bequest in 1972 - and fees of $15. to $25. it charges for meeting a traveler.

in sociology and psychology, law degrees from the Sorbonne (doctorate). To better assist foreign clients (immigrants, refugees) he undertook at considerable sacrifices - he had a wife and three young children-graduate studies on subjects related to his work: "Immigration and Nationality", "Consular law", etc. at New York University, and in June 1965 was awarded a Master' degree in International Law (Record on Appeal, Exhibits 15, 16 (2). His performance, dedication, character were consistently highly praised (Record. Exhibits 17 to 25 (3). In the thirteenth year of his employment an opening for advancement occurred at the Society' airport unit where he worked since he joined the organization and was frequently "in charge". He applied in writing to be considered (R. Exhibit 22-(3), but the Acting General Director

to whom the petition had to be addressed, without submitting it to the "Personnel Committee of the Board of Directors" of Section V of the employment's bylaws (Record on Appeal, 5-(28), appointed to the position an employee from another unit, with eight years less seniority. Conferences in which the petitioner protested were to no avail. Being now aged 62, with three children to put through college, bound to train the new airport chief who had never set foot at the airport, petitioner hung on the hope that, before he reaches 65, he would somewhat be upgraded (to "acting", or "assistant", or "deputy" supervisor) as a pre-retirement measure enhancing his benefits, a common practice; but this never materialized, and, by application of section IV of the Bylaws setting 65 as the age to

retire (Record 5-(24), he ended his 16-year career at the worst financial conditions: a salary frozen at the lowest bracket ($9,000), no savings, and a derisory pension of $98.59, while the new airport boss was being paid $17,000. He was fourteen years younger. After ascertaining this fact, and before the one-year statute of limitation of section 297.5 of the state law on human rights elapsed, he filed, in December 1975, an administrative complaint for 'unlawful age discrimination', demanding a determination of "probable cause", not a money judgment. In a hurried hearing at which appeared the Society's attorney and a new General Director unacquainted with the petitioner's years of service (the Acting director involved had resigned in the interval), respondent denied being age-biased showing that the

society did promote aged workers in the past, but it also unleashed a flow of verbal charges, uttered without a single supportive document, culminating with the devastating accusation that petitioner ~~he~~ refused service to clients- a behavior which, if true, would have produced his dismissal at the first occurence. . . Uncritically espousing every negative word proferred, the Division concluded that "there is no reason to believe complainant was denied equal terms, conditions and privileges or refused promotion because of his age". (Record 3-5). The decision was upheld by the administrative appeals Board without conducting an investigation of its own, by Order of August 19, 1977, with, characteristically, one of its three statutory members, "the Hon. R. Wong, not participating" (Record 3-6). Complainant had until

September 18, 1977 to seek review by the Supreme Court.

It was at this point that, sifting through the papers deposed by the respondent to see what, in the record, might have motivated the charges against him, he came across his personal file hitherto out of his reach and the disclosure was glaring: not only was there absolutely nothing documenting any of those charges, but the entire record consisted of a succession of laudatory "EVALUATIONS" drafted year after year by his superiors pursuant to a provision of the employment's bylaws disposing: "AN ANNUAL WRITTEN EVALUATION OF EACH EMPLOYEE IS REQUIRED. MEMBERS OF THE PROFESSIONAL STAFF ARE EVALUATED BY THEIR IMMEDIATE SUPERVISOR" (Record 5-23).

Systematically ignored and concealed, to be replaced by the slanders uttered at the hearing, the single and only one held in the case, their emergence cast a totally new light on the controversy, placing it beyond the boundaries of section 297.9 of the state law, in the broader area of bad faith.

Cutting short his procedure under the slippery "age bias grievance" now transcended, forfeiting its "judicial review" procedure, which should have been entered by September 19, 1977 pursuant to section 298 of that law, the petitioner filed three days later, on September 22, 1977, a civil action for intentional damage for breach of the employment's rules, misrepresentation, wilful dissimulation. (Record 1-(4).

Respondent moved to dismiss it for alleged "lack of a cause of action", by summary judgment, under New York CPLR 3211 and 3212 (Record 2 (2).

The Court below granted the motion on the basis of its Memorandum of December 20, 1977, decided in a way not in accord with applicable decisions of this Court - Its reasoning went as follows (quoting):

> "The Human Rights Law (Executive Law, §297 (9) provides that anyone aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and any such other remedies as may be appropriate, unless such person has filed a complaint hereunder. Thus the statute makes it plain that a person aggrieved was to have only one bite at the apple. He is free to chose the administrative route or the judicial route. He cannot run on both courses. This is in line with the policy of the law in civil matters. An issue once finally decided is foreclosed forever" (Appendix B)
>
> Note: the term "discrimination" is used loosely throughout the Memorandum in disregard of section 292.4 of the law invoked.

The federal question arising from the lower Court's sweeping interpretation of §297.9 affects the whole class of aged workers and was raised four times during the pleadings: (1) at p. 5, second paragr. of plaintiff's Memorandum accompanying Notice of Appeal (Record on Appeal, p. 125); "where a disposition abridges the constitutional (equal) right to (Court) action, it cannot be extended by analogy or interpretation"; (2) at p. 22, par. 3 of petitioner's Brief on Appeal: "A disposition abridging the constitutional right to seek judicial relief for damage...cannot be extended by interpretation or analogy"; (3) in petitioner's "Memorandum of Law" to the Court of Appeals, p. 4, second paragr.: "...the disposition thusly construed would be unconstitutional whatever its wording"; (4) in p. 26, par. 4 of brief in support of Motion

for Leave to appeal to the Court of Appeals.

REASON FOR GRANTING THE WRIT

1. The Court below overlooked sections 300 and 301, the former, on "Construction", disposing that the statute shall be interpreted "liberally" for the accomplishment of its purpose, which ultimately, is the protection of the worker; the latter, on "Separability", excluding rigid application of its clauses, and allowing consideration of: "the persons and the circumstances involved in the controversy".

2. The paramount circumstance here involved which the lower Court failed to weigh was that, because the statutory documents upholding his candidacy were deliberately absconded, the petitioner was deprived of evidentiary elements to support a court action, hence, in December 1975, his administrative complaint of age bias:

he had not, at that date, a free choice of remedies, but was hurried by the one-year statute of limitation to take action.

In "Michael Glus v. Brooklyn Eastern District Terminal", 359 U.S. 232, 233, citing ten cases in support, this Court, affirmed the long-standing jurisprudence barring procedural objections where it is defendant's concealment of papers detrimental to his stand which produced the delay between the accrual of the cause of action and the institution of legal proceeding. It said:

> "Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitation."

3. The dateline for judicial review of the administrative denial of age discrimination was September 19, 1977. In the interval came to light the documents leading to petitioner's civil action, filed on their basis on September 22, 1977, a three-day difference.

In "Rinaldi v. Yeager", 384 U.S. 305 86 S. Ct. 1497-16 L. Ed. 2d. 577, this Court ruled:

> "The equal protection clause requires that once a state establishes avenues of appellate review, those avenues be kept free of unreasonable distinctions that can only impede open and equal access to the courts". (Appendix G)

And in "Judson Griffith and James Crenshaw v. People of the State of Illinois", 351 U.S. 12-100 L. Ed. 2d 891, 611, 76 S. Ct. 585, this Court said:

> "The equal protection of the laws

> does not deny a state the right to make classifications in law when such classifications are rooted in reason; the equality at which the equal protection clause aims is not a disembodied equality since laws are not abstract propositions".
>
> "A law nondiscriminatory on its face may be grossly discriminatory in its operation."

See also "Canadian Northern R. C° v. Eggen", 252 U.S. 553, 40 S. Ct. 402 - 64 L. Ed. 2d. 713, 563,

> "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection".

4. This Court's dedication to weighing the circumstances in the flesh instead of relying on abstract distinction, has been unequivocally affirmed in "Cohen v.

Hurley", 366 U.S. 117 81 S. Ct. 954 - 6 L. Ed. 2d. 156:

> "What state procedures are fair, what state process in constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and history is relevant to the inquiries" (underscore supplied).

The petitioner, respectfully, prays that he be allowed to close his defense by quoting the following bits from his sixteen-year "history" at the Society's service:

1961: "...has genuine interest and feeling for people-selected to attend the Regional Conference in Montreal" (Exhibit 24);

1966: "...you are doing a very fine piece of work" - Greek boy case (Exhibit 17);

1967: "...everyone (at the Board of Directors meeting) was interested in your case" (Exhibit 18)
"...your sensitive and thoughtful handling of clients" (Exhibit 19);

1969: "...Should the airport supervisor decide to seek another job, I would have no hesitation in recommending that Mr. Tinawy be appointed "Worker-in-Charge, with an appropriate increment in salary since he was designated worker in charge in the absence of the supervisor";

1974: "There will be a retirement luncheon for Christian Tinawy on Friday November 8, at 1:00 PM at the International Hotel JFK Airport."

CONCLUSION

For these reasons a writ of certiorari to review the Order of New York State Court of Appeals should issue.

Respectfully submitted,

CHRISTIAN A. TINAWY, LL.D.
35-06 88th Street
Jackson Heights, N.Y. 11372
(212) 478-5799
Petitioner.

August 1st, 1979

Appendices

APPENDIX A

ORDER OF JAN. 23, 1978 DISMISSING COMPLAINT, BY SPECIAL TERM PART I ON BASIS OF COURT MEMORANDUM DATED DECEMBER 20, 1977

At a Special Term, Part 1, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, N.Y., on the 19 day of January, 1978.

PRESENT:

Hon. MAX BLOOM,

Justice.

CHRISTIAN A. TINAWY, Plaintiff, -against- TRAVELERS AID SOCIETY OF NEW YORK, INC.-- ELIZABETH C. ANDERSON, GENERAL DIRECTOR, Defendant.	Index No. 15981/77 ORDER

Defendant Travelers Aid Society of New York having moved for summary judgment dismissing the complaint,

Now, upon the Notice of Motion dated

September 22, 1977, and the Affidavit of March Coleman, sworn to September 22, 1977, and exhibits attached thereto, both with proof of service thereon and submitted in support of defendant's motion for summary judgment, upon the complaint in the form of an Affidavit of plaintiff Christian A. Tinawy, sworn to August 30, 1977, plaintiff's September 28, 1977, Submission of Exhibits, and after due deliberation and upon the Court's Memorandum Decision dated December 20, 1977, it is

ORDERED that the motion of defendant Travelers Aid Society of New York for summary judgment is granted in all respects and the complaint and all the causes of action therein asserted are dismissed with prejudice.

E N T E R

S/Max Bloom
J. S. C.

Filed: Jan. 24, 1978
New York Co. Clerk's
Office

APPENDIX B

COURT MEMORANDUM DATED DEC. 20, 1977

CAL. NO. 16-12/19/77

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

- - - - - - - - - - - - - - - - - -

CHRISTIAN A. TINAWY,

Plaintiff,

Index No.

-against-

15981/77

TRAVELERS AID SOCIETY
OF NEW YORK, INC., -
ELIZABETH P. ANDERSON,
GENERAL DIRECTOR,

Defendant.

- - - - - - - - - - - - - - - - - -

MAX BLOOM, J.:

Plaintiff brings action against his former employer to recover for an alleged breach of agreement. Originally, defendant moved to dismiss, pursuant to CPLR 3211, upon the ground that the complaint failed to state a cause of action. The motion has, by stipulation, been converted into a motion for summary judgment.

So far as can be ascertained from the papers, plaintiff entered the employ of defendant in 1958 or 1959. In 1971, a vacancy occurred in a higher position for which plaintiff deemed himself qualified. Accordingly, he applied therefor. As happens not infrequently, particularly in institutions layered over with bureaucracy, the employer disagreed. When plaintiff remonstrated with his immediate superior, he was told that while he was not fired, he could, if he wished, resign.

Plaintiff continued to work for defendant until December 31, 1974, at which time he retired. The last month of his employment represented an accumulated vacation. While on this terminal vacation, he filed a verified complaint with the State Commission on Human Rights, charging discrimination in employment asserting a denial of promotion because of age.

After investigation, the Regional Director refused to issue a complaint against defendant, asserting that there was no probable cause to believe that it had engaged in discriminatory practices. Appeal was taken from this determination, and, in August, 1977, the Commission affirmed the determination of the Regional Director. Immediately thereafter, this action was brought.

The plaintiff now contends that a brochure referred to as "Employees Handbook" issued by defendant constituted an agreement between defendant and its employees and that the statement contained therein that "[i]t is the policy of the Society to promote employees from within, where qualified employees are available and desire such promotions" and that the criteria employed in making such promotions -- "(1) performance, (2) leadership,

(3) length of service, and (4) special contribution to the total job", conferred upon him a contractual right to the promotion in question.

The Human Rights Law provides (Executive Law, §297[9]), that anyone aggrieved by an unlawful discriminatory practice, "shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person has filed a complaint hereunder***". Thus, the statute makes it plain that a person aggrieved was to have only one bite at the apple. He is free to chose the administrative route or the judicial route. He cannot run on both courses. This is in line with the policy of the law on civil matters. An issue once finally decided is forever foreclosed.

Although the ingenuity of plaintiff has devised a different form, the substance remains the same. The issue here sought to be litigated is whether the employer, in selecting another for the position sought by plaintiff, discriminated against plaintiff. The pouring of old wine into a different vessel does not make it new wine.

Moreover, under no construction of the law can the brochure issued by defendant to assist its employees be deemed a contract. Thus, whether viewed in a "contractual" context or as a claim of discrimination, no justiciable issue is presented.

Accordingly, defendant's motion for summary judgment is granted.

Settle order.

Dated: New York, New York

December 20, 1977.

Hon. MAX BLOOM
JUSTICE OF THE
SUPREME COURT

Filed: Jan. 24, 1978
New York Co.
Clerk's Office

APPENDIX C

ORDER OF AFFIRMANCE BY APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 24, 1978

PRESENT:

Hon. Theodore R. Kupferman,
Justice Presiding
Herbert B. Evans
Myles J. Lane
Leonard H. Sandler
Joseph P. Sullivan Justices

CHRISTIAN A. TINAWY,	)	
Plaintiff-Appellant,	)	
-against-	)	3623
TRAVELERS AID SOCIETY OF NEW YORK, INC. -- ELIZABETH P. ANDERSON, GENERAL DIRECTOR,	)	
Defendant-Respondent.	)	

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Bloom, J.) entered on January 24, 1978,

granting defendant's motion for summary judgment and said appeal having been argued by Mr. Jerome M. Field of counsel for the appellant, and by Mr. March Coleman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

Joseph J. Lucchi, Clerk.

APPENDIX D

ORDER DENYING REARGUMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 23, 1979

PRESENT:

Hon. Theodore R. Kupferman,
Justice Presiding
Herbert B. Evans
Myles J. Lane
Leonard H. Sandler
Joseph P. Sullivan Justices

CHRISTIAN A. TINAWY, Plaintiff-Appellant, -against- TRAVELERS AID SOCIETY OF NEW YORK, INC. - ELIZABETH P. ANDERSON, GENERAL DIRECTOR, Defendant-Respondent.	M-4196

The above named plaintiff-appellant having moved for leave to reargue his appeal from the order of the Supreme Court, New York County, entered on January 24, 1978,

which order was unanimously affirmed by order of this Court entered on October 24, 1978 or, in the alternative for leave to a appeal to the Court of Appeals,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statements of Christian A. Tinawy, in support of said motion, and the memorandum of Messrs. Cravath, Swaine & Moore in opposition thereto, and after hearing Mr. Christian A. Tinawy, appearing pro se, for the motion, and Messrs. Cravath, Swaine & Moore opposed,

It is ordered that said motion be and the same is hereby denied in all respects with $20. costs.

ENTER:

Joseph J. Lucchi, Clerk.

APPENDIX E

ORDER BY NEW YORK STATE COURT OF APPEALS DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of March A.D. 1979

PRESENT, Hon. Lawrence H. Cooke,
Chief Judge, presiding.

Mo. No. 212
Christian A. Tinawy,
Appellant,

vs.

Travelers Aid Society of New York, Inc., Elizabeth P. Anderson, General Director,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and

the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

Joseph W. Bellacosa
Clerk of the Court

APPENDIX F

ORDER OF NEW YORK STATE COURT OF APPEALS DENYING REARGUMENT

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of May A.D. 1979

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

Mo. No. 438
Christian A. Tinawy,
Appellant,

vs.

Travelers Aid Society of New York, Inc., Elizabeth P. Anderson, General Director,
Respondent.

A motion for reargument of a motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

Joseph W. Bellacosa
Clerk of the Court

APPENDIX G

*[384 US 305]

*JOSEPH A. RINALDI, Appellant,

v

HOWARD YEAGER, Warden, et al.

384 US 305, 16 L ed 2d 577, 86 S Ct 1497

[No. 940]

Argued April 21, 1966. Decided May 31, 1966.

SUMMARY

A New Jersey state prisoner unsuccessfully appealed in forma pauperis from his conviction, having been furnished by the county, on his application, with a transcript of the trial court proceedings. Pursuant to a state statute, each day's pay for his prison work was withheld from him to reimburse the county for the cost of the transcript. Under New Jersey law, only those confined in state institutions were required to make such reimbursement. He sued in the United States District Court for the District of New Jersey to enjoin enforcement of the statute on the ground that it was unconstitutional. A three-judge court entered summary judgment against him. (238 F Supp 960.)

On direct appeal, the Supreme Court of the United States reversed. In an opinion by STEWART, J., expressing the view of eight members of the Court, it was held that the statute violated the equal protection clause by invidiously discriminating between prisoners, on the one hand, and those fined, given suspended sentences, or placed on probation, on the other.

HARLAN, J., dissented on the ground that the statute made a rational classification.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Constitutional Law § 509 — equal protection — transcripts — reimbursement of county

1. A state statute requiring that a county treasurer be reimbursed from a convict's institutional earnings for the expense paid by the county treasurer for the transcript of trial court proceedings necessary for the convict's in forma pauperis application to

ANNOTATION REFERENCE

Right under Federal Constitution of indigent defendant in criminal case to aid of state as regards appeal or postconviction remedy. 6 L ed 2d 1295. See also 100 ALR 321 and 55 ALR2d 1072.

the trial court or appeal to an intermediate appellate court violates the equal protection of the laws, as a discriminatory classification, where state law requires no such repayment from one fined, given a suspended sentence, or placed on probation.

Constitutional Law § 319 — equal protection clause — rationality

2. The equal protection clause requires more of a state law than nondiscriminatory application within the class it establishes; it also imposes a requirement of some rationality in the nature of the class singled out.

Constitutional Law § 318 — equal protection clause — legislative classifications

3. The equal protection clause is not a demand that a statute necessarily apply equally to all persons, and does not require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends.

Constitutional Law § 318 — equal protection — classification

4. The equal protection clause requires that in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made.

Constitutional Law §§ 493, 509 — appeals — equal protection of the laws

5. The equal protection clause requires that once a state establishes avenues of appellate review, those avenues be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

APPEARANCES OF COUNSEL

Frederick B. Lacey argued the cause for appellant.

Alan B. Handler argued the cause for appellees.

Briefs of Counsel, p 1271, infra.

OPINION OF THE COURT

Mr. Justice Stewart delivered the opinion of the Court.

The appellant, Joseph A. Rinaldi, was convicted of a criminal offense in a trial court of Essex County, New Jersey, and sentenced to prison

*[384 US 306]

for a term of five to 10 *years. The Superior Court of New Jersey, Appellate Division, allowed him leave to appeal in forma pauperis and granted his petition for a transcript of the trial court proceedings, finding that the transcript was needed for the appeal and that Rinaldi was unable to pay for it.[1] Rinaldi's ap-

1. The following New Jersey statute authorizes initial imposition of the expense of the transcript upon the county:

"Any person convicted of any crime may make application under oath to any judge of the County Court or Law Division of the Superior Court of the county where the venue was laid showing that a copy of the transcript of the record, testimony and proceedings at the trial is necessary for the filing of any application with the trial court, and that he is unable, by reason of poverty, to defray the expense of procuring the same, and any such judge may, being satisfied of the facts stated and of the sufficiency thereof, certify the expense thereof to the county treasurer, who shall thereupon pay such expense, the amount thereof having been approved by the judge to whom such application was made. Where such person appeals to the Appellate Division of the Superior Court and copies of the transcript of the proceedings in the trial court are needed therefor he may make a similar application to such court which, being satisfied of the facts stated and the sufficiency thereof, may certify the expense and amount thereof to the county treasurer who shall thereupon pay such expense." NJ Stat. Ann. § 2A:152–17 (1964 Cum Supp.).

peal was unsuccessful, and he is now an inmate in the New Jersey State Prison.

As compensation for his work in prison, Rinaldi earns 20 cents a day, five days a week. Since late 1963, however, every day's pay has been withheld from him by prison officials and sent to the Treasurer of Essex County, in order to reimburse the county for the $215 cost of the transcript it provided for his appeal. This has been done in accordance with a statute enacted by New Jersey in 1956, shortly after this Court's decision in Griffin v Illinois, 351 US 12, 100 L ed 891, 76 S Ct 585, 55 ALR2d 1055. Rinaldi brought this suit to enjoin enforcement of the statute on the ground

*[384 US 307]

that it is unconstitutional.[2] *A three-judge Federal District Court denied relief, 238 F Supp 960, and we noted probable jurisdiction, 382 US 1007, 15 L ed 2d 524, 86 S Ct 627.

The statute in question is NJ Stat Ann § 2A:152–18 (1964 Cum Supp), and it provides as follows:

"The county treasurer shall file a notice of [the payment by the county] and the amount thereof with the institution in which said person, upon whose application the transcript of the record was prepared, is confined, and, to the extent of the expense incurred, the county treasurer shall be reimbursed from any institutional earnings of such person, in the event that the application for relief is denied by . . . an appellate court."

Rinaldi attacked the constitutionality of this statute on the basis of our decisions defining the duty of a State, under the Equal Protection Clause and the Due Process Clause, not to limit the opportunity of an appeal in a criminal case because of the appellant's poverty. Griffin v Illinois, supra; Burns v Ohio, 360 US 252, 3 L ed 2d 1209, 79 S Ct 1164; Draper v Washington, 372 US 487, 9 L ed 2d 899, 83 S Ct 774; cf. Smith v Bennett, 365 US 708, 6 L ed 2d 39, 81 S Ct 895; Lane v Brown, 372 US 477, 9 L ed 2d 892, 83 S Ct 768. A logical extension of these decisions, the appellant contends, would prohibit a State from discouraging an indigent's freedom to appeal by saddling him with the obligation of paying for the cost of a transcript in the event his appeal is unsuccessful. We do not reach

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this contention, however, *because we find the statute constitutionally deficient upon a different ground.

[1] The New Jersey law does not impose this financial burden upon all who have been convicted in its courts and whose appeals have been unsuccessful. It requires no repayment at all from a man who has received a suspended sentence or been placed on probation, regardless of how high his subsequent earnings may be. It requires no repayment at all from an unsuccessful appellant who has been sentenced only to pay a fine.[3] Instead, the law fastens the duty of repayment only upon a single

2. The suit was brought pursuant to R.S. § 1979, 42 USC § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. It is true that some indigents who are fined may not be able to pay the fine. New Jersey provides that they may be placed at labor in an institution until the fine is paid. NJ Stat. Ann. § 2A:166–14;

class of unsuccessful appellants—those who are confined in institutions.[4] We find that the discriminatory classification imposed by this law violates the requirements of the Equal Protection Clause.

[2-4] The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. McLaughlin v Florida, 379 US 184, 189–190, 13 L ed 2d 222, 226, 227, 85 S Ct 283. It also imposes a requirement of some rationality *in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . . to be treated in law as though they were the same." Tigner v Texas, 310 US 141, 147, 84 L ed 1124, 1128, 60 S Ct 879, 130 ALR 1321. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." Baxstrom v Herold, 383 US 107, 111, 15 L ed 2d 620, 624, 86 S Ct 760; Carrington v Rash, 380 US 89, 93, 13 L ed 2d 675, 678, 85 S Ct 775; Louisville Gas Co. v Coleman, 277 US 32, 37, 72 L ed 770, 773, 48 S Ct 423; Royster Guano Co. v Virginia, 253 US 412, 415, 64 L ed 989, 990, 40 S Ct 560.

[1] We have been referred to no record of legislative history that might disclose with precision what this law was designed to achieve, but the statute itself bears the heading "Reimbursement." We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures. To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination. Those appellants who have been sentenced only to pay fines have been accorded the same benefit by the county—a transcript used in an unsuccessful appeal, and all that distinguishes them from their institutionalized counterparts is the nature of the penalty attached to the offense committed. There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision. Likewise, an appellant subject only to a suspended sentence or to probation is likely to differ from an inmate only in the

NJ Stat. Ann. § 2A:166–16. Those who are convicted of misdemeanors, however, may be permitted to go at large until the fine is paid. NJ Stat. Ann. § 2A:166–15. Moreover, felony defendants indigent for transcript purposes may be able to obtain the money to pay a fine and thus avoid confinement in an institution and the reimbursement obligation that such confinement entails.

4. Moreover, in view of another New Jersey statute, it appears that wages may not be withheld from every inimate who would otherwise be indebted to a county. NJ Stat. Ann. § 30:4–92 provides in relevant part: "Compensation for inmates of correctional institutions may be in the form of cash or remission of time from sentence or both." Hence, some inmates may not receive cash in exchange for their labor. Other inmates, or course, may not be assigned to work. The reimbursement statute appears to allow for these variations insofar as it provides that ". . . the county treasurer shall be reimbursed from *any* institutional earnings of such person." (Emphasis supplied.)

extent of his criminal record. That, too, is a trait unrelated to the fiscal

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objective *of the statute. Finally, the classification established by the statute cannot be justified on the ground of administrative convenience. Any supposed administrative inconvenience would be minimal, since repayment could easily be made a condition of probation or parole,[5] and those punished only by fines could be reached through the ordinary processes of garnishment in the event of default.[6]

Apart from its fiscal objective, the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals. Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed.

[5] This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v Illinois, 351 US 12, 100 L ed 891, 76 S Ct 585, 55 ALR2d 1055; Douglas

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v California, 372 US *353, 9 L ed 2d 811, 83 S Ct 814; Lane v Brown, 372 US 477, 9 L ed 2d 892, 83 S Ct 768; Draper v Washington, 372 US 487, 9 L ed 2d 899, 83 S Ct 774. We may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay. But any such provision must, under the Equal Protection Clause, be applied with an even hand.

The judgment is reversed, and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Mr. Justice Harlan, dissenting.

New Jersey recoups the cost of trial transcripts furnished to indigents out of prison allowances made to incarcerated prisoners, but does not seek reimbursement from parolees or convicted defendants not imprisoned. The Court holds this differentiation to violate the Equal Protection Clause. I am unable to agree. Under conventional equal-protection standards which disapprove only irrational and arbitrary classifications, the statute is plainly valid. See McLaughlin v Florida, 379 US 184, 190–191, 13 L ed 2d 222, 227, 228, 85 S Ct 283; McGowan v Maryland, 366 US 420, 426, 6 L ed 2d 393, 399, 81 S Ct 1101; Lindsley v Natural Carbonic Gas Co. 220 US 61, 78–79, 55 L ed 369, 377,

5. See NJ Stat. Ann. § 2A:168–2; NJ Stat. Ann. § 2A:167–8. See, Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn L Rev 1, 23–24:

"The practice of certain judges in some of [the counties studied] and of all judges in others is to require, as a condition of probation, that the convicted indigent repay the county's expenditure for his lawyer. The probation officer usually informs the judge of the amount the defendant should be expected to repay each week. The survey indicates that this condition of probation is rarely, if ever, violated."

6. See NJ Stat. Ann. § 2A:17–50.

378, 31 S Ct 337. Surely the State might reasonably choose to reimburse itself for such transcript costs out of prison allowances, but deem it not worth the added time and trouble, or even advisable, to attempt to extract such charges from a convict not in prison who must support himself on his own resources. Adhering to the traditional test of rationality, I would affirm the decision of the District Court.†

† I find no substance to appellant's main argument, which the Court lays aside, that to permit any such recoupment from an indigent is an unconstitutional deterrent to appeal. Nor do I think there is any force to the argument in n. 4 (ante, p. 580), not even suggested by appellant, which at best goes to the validity of the statutes governing compensation and not to the reimbursement statute being reviewed.

opposition

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1979

No. 79-165

CHRISTIAN A. TINAWY,
Petitioner,

-against-

TRAVELERS AID SOCIETY OF NEW YORK, INC.,
ELIZABETH P. ANDERSON, General Director,
Respondents.

On Petition For Writ Of Certiorari To The New York State Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner was employed as a caseworker by respondent, Travelers Aid Society of New York, Inc. ("Travelers Aid") (a nonprofit charitable organiza-

tion providing assistance to travelers in distress) between 1958 and 1974. In 1971, a vacancy occurred in one of the four supervisory positions at Travelers Aid; petitioner requested appointment to the position but another employee, whom Travelers Aid deemed better qualified, was appointed. Petitioner remained with Travelers Aid thereafter until his retirement in 1974, at the age of 65.

In December 1975, petitioner instituted an administrative proceeding with the New York State Human Rights Division, alleging employment discrimination based on age in violation of the New York Human Rights Law. Following conferences with the parties and production of relevant documents by Travelers Aid, the Division dismissed the complaint in April 1976. In August 1977, on petitioner's administrative appeal, the Appeal Board affirmed the dismissal.

Petitioner then instituted this state court action in September 1977, alleging that Travelers Aid had breached a contract by failing to promote him to the supervisory position. Travelers Aid moved for summary judgment, since there was no such contract of employment. The Supreme Court, New York County, granted summary judgment in favor of Travelers Aid on December 20, 1977 (Pet. A. 4a-9a),* and an order, dated January 24, 1978, was entered thereon in that court (Pet. A. 1a-3a). By orders entered on October 24, 1978 (Pet. A. 10a-11a), and January 23, 1979 (Pet. A. 12a-13a), respectively,

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* "Pet. A" citations refer to pages of petitioner's appendix.

the Appellate Division of the Supreme Court, First Department, affirmed the entry of summary judgment and denied petitioner's motion to reargue the appeal or for leave to appeal to the New York Court of Appeals. A motion for leave to appeal to the Court of Appeals was denied by that court on March 29, 1979 (Pet. A. 14a-15a), and on May 3, 1979, the Court of Appeals denied petitioner's motion for reargument (Pet. A. 16a-17a).

ARGUMENT

THE PETITION FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION AND THE DECISION OF THE NEW YORK SUPREME COURT IS BASED ON AN ADEQUATE, INDEPENDENT NONFEDERAL GROUND

Petitioner appears to argue that the section of the New York State Human Rights Law, N. Y. Executive Law § 297(9) (McKinney Supp. 1976), which provides, in essence, that no person who has brought an action before a state administrative agency based upon a claim of unlawful discrimination under the Human Rights Law may later seek to relitigate the same claim thereunder in the New York State courts, is, at least as pertains to his case, somehow incompatible with the Fourteenth Amendment.

The December 20, 1977, opinion of the Supreme Court (Pet. A. 4a-9a) makes it clear, however, that in the context of this case the petition raises an entirely academic question since the

court did, in fact, rule on the merits of petitioner's claim for breach of contract (the only claim set forth in petitioner's state court complaint) (Pet. A. at 8a). The decision was affirmed unanimously without opinion by the Appellate Division of the Supreme Court. This petition thus fails to raise any federal question for review, and, in any event, the New York Supreme Court's judgment denying petitioner's state law contract claim represents an adequate, independent nonfederal ground of decision. This Court therefore lacks jurisdiction under 28 U.S.C. § 1257 to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

August 30, 1979

Respectfully submitted,

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